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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 861

VALMORE J. FORGETT, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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February 23, 1966.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The Government's Brief in Opposition is premised on a reading of § 5855 of the National Firearms Act that (1) is belied by the plain words of the statute, and (2) is contrary to the theory of the indictment, the prosecution and the conviction of this petitioner. Indeed, so gross is the difference between the argument now advanced by the Government and the basis of the conviction as to raise a serious due process question. As was held in *Cole* v. *Arkansas,* 333 U.S. 196, 202, petitioner is entitled, as a matter of due process, to have the validity of his conviction "appraised on con-

sideration of the case as it was tried and as the issues were determined in the trial court." The Government would now deny him that right.

At the trial court level, petitioner was charged in the indictment with having violated § 5855 in that he shipped in interstate commerce some 52 firearms "without having registered the said firearms with the Secretary of the Treasury or his delegate as required by Section 5841." D.A.1. This indictment thus reflected that portion of § 5855 which makes it a crime "for any person who is required to register as provided in section 5841 and who shall not have so registered" to transport any firearm in interstate commerce.[1] The quoted words of that section clearly contemplate that the defendant himself be the one who was obligated to register under § 5841 and who failed in that obligation. By that language the necessity—and therefore the constitutionality—of registration under § 5841 is necessarily brought into issue in a transportation prosecution under § 5855.

That issue was both recognized and resolved in the trial court. District Judge Kalbfleisch's pretrial memorandum (see Pet., p. 2a), holding § 5855 to be constitutional despite its incorporation of § 5841's registration provisions, noted that "defendant's guilt, if it be ascertained, could only, under the facts as charged, be premised upon his failure to register pursuant to Section 5841." And District Judge Battisti, in charg-

[1] Section 5855 also makes it unlawful for "any other person who has not in his possession a stamp-affixed order as provided in section 5814 or a stamp-affixed declaration as provided in section 5821" to ship or deliver any firearm in interstate commerce. But that portion of § 5855 is not here involved. Petitioner was not charged with having failed to possess a § 5814 order or a § 5821 declaration. He was charged with having failed to register under § 5841, as required.

ing the jury, stated that one of "the essential elements of the offense charged in this indictment" which had to be proved "beyond a reasonable doubt" was that "the defendant was required to register all or any of these firearms." G.A. 36b.

Thus this petitioner stands convicted solely on the ground that he transported firearms that he himself was required to register under § 5841, a ground which is dictated by the language used in § 5855. But the Government would now change the theory of the statute as well as of this conviction. It would recast both the statute and the conviction so as to make the gist of the offense the mere act of "shipping unregistered guns in interstate commerce" (Opp., p. 6)—i.e., guns which no one ever registered. It would read out of § 5855 and out of this conviction any need for proving what Congress has so plainly required—the obligation of the defendant himself to register under § 5841 the firearms which were transported in interstate commerce. At every portion of its brief, the Government discreetly attempts to assume away this very vital statutory requirement.

Only by omitting this plain requirement of § 5855 can it be said, as the Government urges (Opp., p. 5), that this case is analogous to such cases as *Frye* v. *United States,* 315 F. 2d 491 (C.A. 9), and *Starks* v. *United States,* 316 F. 2d 45 (C.A. 9), involving prosecutions under § 5851 for unlawful possession of unregistered firearms. Under § 5851, as the *Starks* opinion noted (316 F. 2d at 46), "It is the possession of a gun that no one has registered, not the failure by appellant to register, that is the essence of the offense." To prove a § 5851 violation, therefore, it is unnecessary to show any obligation on the defendant to perfect a registration under § 5841; hence the con-

stitutionality of the registration provision cannot come into issue.

But where, as under § 5855, the defendant is the one required to register and the failure so to register is an essential predicate of a violation of the interstate transportation provision, the necessity and the constitutionality of such registration are necessarily brought into focus. It is on that basis that the conflict between the decision below and those rendered by the Ninth Circuit in *Russell* v. *United States,* 306 F. 2d 402, and by the Seventh Circuit in *Dugan* v. *United States,* 341 F. 2d 85, becomes plain. And it is on that basis that the necessity of proof by the Government that the petitioner himself was obligated to register under § 5841 becomes obvious. It is not enough, as the Government claims (Opp., p. 7), that the firearms in question had never been registered under *any* section of the Act. Unless there is proof that the petitioner himself, rather than someone else, was obligated to register, there has been no violation of § 5855—applicable by its express terms only to "any person who is required to register as provided in section 5841"[2]

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[2] The Government's argument (Opp., p. 7) that under § 5841 any transferee of a firearm is required to register unless the firearm has already been registered, and that proof of non-registration therefore proves that petitioner was required to register before shipping the firearms interstate, is specious. According to the Government (Opp., p. 6, n. 4), petitioner, as a transferee, would have been "required to record with the Treasury Department [under § 5814(c)] at the time he received the firearms in question . . . essentially the same [information] as that required of persons falling within the registration provision of Section 5841." But there was no proof of that requirement and hence no basis for the jury to conclude under § 5855 that petitioner was "required to register as provided in section 5841."

Nor can it be said, as the Government would have it (Opp., p. 4), that the *Russell* and *Dugan* decisions merely held that *prosecutions* for failure to register under § 5841 violate the privilege against self-incrimination. Those decisions held that § 5841 was in and of itself unconstitutional by virtue of the Fifth Amendment. See *Harris* v. *United States,* 338 F. 2d 75, 80, where the Ninth Circuit referred to its *Russell* decision in these terms: "Since the mere act of registration compelled incrimination this court held the statute unconstitutional." And, where, as here, an interstate transportation prosecution is premised upon a failure to comply with such an unconstitutional provision, the conflict and the confusion become compounded.

Finally, the assertion of the Government (Opp., p. 4, n. 2) that non-registration prosecutions under § 5841 "are no longer being brought by the government" in no way detracts from the existence of the live conflict between circuits over the constitutionality of the registration requirement or from the important questions thereby presented. Refusal to enforce a criminal law does not bear upon its continuing validity or invalidity; nor does it preclude the possibility, made a reality in this case, of unfair enforcement against an innocent party as part of a transportation prosecution. See *District of Columbia* v. *Thompson Co.,* 346 U.S. 100, 117. The issues raised in the petition accordingly remain ripe and appropriate for resolution.

CONCLUSION

The attempt by the Government to rewrite § 5855 and to alter the basis of the conviction below cannot disguise the conflict concerning the constitutionality of the registration provisions of the National Fire-

arms Act. The importance of that question and the resultant confusion in the administration of the Act fully warrant the exercise of this Court's certiorari jurisdiction. And the confusion compounded by the Government in its re-interpretation of § 5855 only adds to the need for an authoritative analysis of that section by this Court.[3]

Respectfully submitted,

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[3] No attempt has been made herein to correct the various factual misstatements in the Government's brief. For example, the petitioner did not purchase the weapons from the dealer in Wisconsin (cf. Opp., p. 3); petitioner received the weapons under a contract wherein he was to sell them as the agent of the dealer. Nor is it at all clear that "a list of all the weapons was sent to the Treasury Department for a registration check" (cf. Opp., p. 3); the inventory prepared by the examining agent was not retained and there was no evidence connecting the inventory list with the list sent to Washington. Moreover, there was no evidence that "a number of the weapons were actually in full operative condition at the time of shipment" (cf. Opp., p. 7, n. 5); only one gun that had been test fired was introduced into evidence but it was not operative. A weapon, to be a "firearm" within the meaning of the Act, must be operative at the time of the alleged offense. *United States* v. *Thompson*, 202 F. Supp. 503 (N.D. Cal.); *United States* v. *Cokin*, Cr. No. 268-64 (D.N.J.), decided Sept. 28, 1965.